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No. 88-2100

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

THOMAS JOSEPH DUFON,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a California Court of Appeal determination, based upon the entire trial court record, that the petitioner received constitutionally effective representation and was not prejudiced by any acts or omissions by his trial attorney, is to be accorded deference by this Court and whether such state appellate court findings pose a federal constitutional question worthy of the granting of certiorari.

2. Whether Laches has attached precluding a claim of incompetence of trial counsel where the intervening death of defense trial counsel has prejudiced the People as a result of the petitioner's unjustified six-year delay in the bringing of the incompetency claim.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The original opinion by the California Court of Appeal, Fourth Appellate District, Division One, issued on February 16, 1982, affirming in entirety the petitioner's convictions for twelve counts of violent sexual offenses committed against seven female victims,

was unpublished as California Court of Appeal Number 4 Crim. 13089.

The opinion by the same California Court of Appeal (Fourth Appellate District, Division One) denying petitioner's March 1988 petition for writ of habeas corpus was also unpublished and is contained in the petition as an appendix. (Petn., Appendix p. a1 through a51.) Petitioner sought review of the denial of the petition before the California Supreme Court and review was denied on April 25, 1989. (Petn., Appendix p. a52.)

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable statutory and constitutional provisions involved are set

forth in the body of the petition at pp. 8-14.

STATEMENT OF THE CASE

In Jury verdicts returned on November 19, 1980, petitioner was found guilty of 12 counts of violent sexual offenses committed against seven female victims. (CT 167-207.)[1/] On January 8, 1981, petitioner was sentenced by the San Diego Superior Court to a term of 27 years in prison. (CT 146-148, 211-214.)

By way of an unpublished opinion filed by the California Court of Appeal, Fourth Appellate District, Division One, on February 16, 1982, petitioner's convictions and sentence were affirmed in their entirety.

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1. Hereafter, citations are to the Clerk's and Reporter's Transcripts of the original trial in this matter and to the record of the petitioner's subsequent petition for writ of habeas corpus before the California Court of Appeal.

Petitioner sought no further review for over six years until February 24, 1988, when he filed a petition for writ of habeas corpus in the California Court of Appeal, Fourth Appellate District, Division One. In an unpublished 51-page opinion filed by that Court on March 2, 1989, the petition for writ of habeas corpus was denied. (Petn., Appendix a1 through a51.)

Petitioner sought review of the denial before the California Supreme Court and review was denied on April 25, 1989. (Petn., Appendix p. a52.)

STATEMENT OF FACTS[2/]

Dufon was convicted of multiple counts, including rape, forcible oral copulation, kidnapping and deadly weapon

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2. In that the petitioner seeks certiorari from the denial of his petition for writ of habeas corpus by the California Court of Appeal, the relevant facts are here taken from that Court's opinion denying the petition on March 2, 1989.

enhancements. The specific incidents are as follows:

Jeri O. and Vickie B. Case

On September 6, 1979, two female teenage hitchhikers were picked up near 54th Street and University Avenue in San Diego by a man in a blue pickup truck with a white camper shell. The man took them to the parking area of a church and, at gunpoint, raped Vickie B. (age 16) and assaulted Jeri O. (15 years of age) in the camper.

Debbie B. Case

On November 27, 1979, a man, at gunpoint, raped and orally copulated Debbie B. (age 25) in the storeroom of her work place, a retail store for eyeglass frames, in La Mesa. The attacker remained in the store after the attack and several customers observed him.

Kathy P. Case

On December 24, 1979, a man offered Kathy P. (age 19) a ride after she missed her bus near El Cajon Boulevard and 52nd Street. She agreed and he took her to his blue pickup truck with camper shell. As they were driving, the man displayed a gun. He drove her to a park where he threatened her with a knife and then raped her and forced her to orally copulate him in the camper.

Margo M. Case

On January 7, 1980, Margo M. (age 25) was raped in her El Cajon apartment by a man who entered under the pretense of using her phone. Margo M.'s three-year-old son was present in the apartment. The man used a gun in the commission of the rape.

Stephanie W. Case

On January 30, 1980, a man in a blue pickup truck with white camper shell

approached Stephanie W. (age 22) at a market at the corner of 52nd Street and El Cajon Boulevard where she had gone to find boxes. He offered to drive her to the other side of the market where he said there were plenty of boxes that he would pick up for her. After she was in the pickup, he displayed a gun and a knife and drove her to a parking lot. There he forced her to orally copulate him in the camper. The man also raped Stephanie W. and put the handle of a brush in her vagina.

Dufon's Arrest and Identification

On March 27, 1980, Dufon, driving a blue pickup truck with white camper shell, was stopped and arrested on El Cajon Boulevard in San Diego. San Diego and La Mesa police officers questioned Dufon who allegedly admitted he had engaged in voluntary sexual relations with Vickie B., Kathy P., Stephanie W. and

Margo M., and denied attacking Debbie B. On March 28, 1980, Dufon's father retained Nemser to represent his son. On that same day the police conducted a lineup without Nemser present. All of the victims identified Dufon. Another victim of a rape attempt, Kathy E., was also present but did not identify Dufon. After Dufon was arraigned he was released on bail.

Janice C. Case

On July 7, 1980, in Imperial Beach, Janice C. (age 19) asked a man driving an automobile, license number 090FLD, to give her a ride. Rather than taking her to work as she wanted, he pulled a knife and drove her to a deserted area where he raped and orally copulated her. Janice C. identified Dufon from a photographic lineup.

Nemser's Disability

In October 1978, [defense attorney] Nemser suffered a brain seizure

caused by aneurysms and underwent brain surgery four times between October and December 1978. When Nemser wanted to return to work in January 1980, his doctor recommended he first undergo psychological testing. The testing showed substantial brain dysfunction, including deficiencies in intellectual organization, conceptual distortions, flaws in logic, difficulty in separating complex situations into logical consistent separate entities, and a tendency to combine ideas that occur contiguously in space or time rather than separating them if they did not relate. The psychologist administering the test felt the dysfunction could substantially interfere with Nemser's ability to function as a trial attorney and thought it might be advisable for Nemser to consider doing other work. However, the psychologist acknowledged Nemser's experience could at least to some extent

counter the impairment. Nemser's physician, while accepting the results of the test as valid, thought Nemser's intuitive ability and experience might allow him to practice on a normal basis. Ultimately, the physician left the decision on resuming practice to Nemser.

In March 1980, Nemser became Dufon's defense attorney. One month after Dufon's sentencing, Nemser requested and received from his doctor a statement that he was totally and permanently disabled since January 1980. (Petn. Appendix, pp. a8 through a12.)

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because the factual findings by the California Court of Appeal that petitioner's counsel acted entirely within the bounds reasonably expected of competent counsel, and in fact petitioner received constitutionally

effective assistance of counsel, are entirely supported by the record and should be accorded deference by this Court.

The petition for writ of certiorari should additionally be denied for no conflict whatever exists between this decision and the decision rendered by the 9th Circuit in *Javor* v. *United States*, 724 F.2d 831 (1984), for the petitioner here was afforded both the right to the assistance of counsel and the right to the effective assistance of counsel. Lastly, the petition for certiorari should be denied because, as the People of the State of California below asserted, laches has attached precluding petitioner's claim of incompetent representation by virtue of his unjustified dilatory eight-year delay in the bringing of this claim.

ARGUMENT

I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE RECORD BELOW FULLY SUPPORTS THE CALIFORNIA COURT OF APPEAL'S DETERMINATIONS THAT PETITIONER NOT ONLY RECEIVED REPRESENTATION, BUT WAS AFFORDED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AND THAT HE WAS NOT PREJUDICED BY ANY ACTS OR OMISSIONS BY HIS TRIAL ATTORNEY

In the original action below, the petitioner's convictions for this brutal series of rapes was affirmed by the California Court of Appeal on February 16, 1982. As the People pointed out, after more than six years of silence, and after the October 1985 death of his retained trial counsel, petitioner sought to benefit from his trial counsel's death by filing a petition for writ of habeas corpus on February 24, 1988, alleging deceased counsel was incompetent. The People denied that petitioner had been rendered the ineffective assistance of

counsel and asserted that laches had attached because of the petitioner's dilatory and unjustified delay in raising this contention. The People asserted that they were irreparably prejudiced by petitioner's delay for the contentions advanced by the petitioner could only best be rebutted by the voice petitioner knew was forever silenced.

The California Court of Appeal, while finding the People's position that the petitioner had not satisfactorily justified his delay in bringing the incompetency claim had "some merit", nevertheless elected to address petitioner's incompetency claims because it determined the issue was a:

> ". . . close question, and considering the constitutional magnitude of Dufon's claims, we reach the merits of his contentions while at the same time keeping in mind the prejudice the People have suffered as a result of Nemser's [trial defense counsel] death." (Petn., Appendix p. a8.)

The California Court of Appeal went on to address each of the contentions advanced by the petitioner which he asserted showed he was rendered the ineffective assistance of counsel. In so doing, the Court of Appeal carefully and comprehensively examined the record and determined the petitioner received fully competent representation and that in any event, none of the claims raised by the petitioner regarding his trial attorney's representation could have resulted in prejudice to him. (Petn. Appendix, pp. a14 to a51.) As the California Court of Appeal saliently held:

> "However, upon reviewing the record, it is evident how this Court came to the conclusion on appeal that Nemser was able counsel who conducted a 'very vigorous and able defense.' While recognizing the apparent deficiencies in Nemser's performance, considering his overall performance we do not find that Dufon has made a prima facie showing Nemser failed to act in

a manner expected of a reasonably competent attorney acting as a reasonably diligent advocate. (*People* v. *Pope*, *supra*, 23 Cal.3d 412, 425.)

"In any event, even if we were to find Dufon had made a prima facie showing Nemser's representation fell below the standard expected of reasonably competent counsel, we find Dufon could not have been prejudiced by any deficiencies in Nemser's representation. *The six women raped identified Dufon. Dufon admitted to police he engaged in voluntary sexual relations with some* of the victims. *One victim, Janice C., provided the police with Dufon's license number.* Dufon would have us believe the victims were mistaken and their identifications tainted, the police from both San Diego and La Mesa fabricated his 'admissions,' and Janice C., her boss, and police from both Imperial Beach and Coronado fabricated the story of his license number. To accept Dufon's position, we must believe all these people, acting either in concert or singly, fabricated the case against Dufon for no apparent reason. We find the evidence against Dufon to be persuasive. We do not find a reasonable probability exists that a more favorable outcome for Dufon would have been reached absent any errors or omissions Nemser

> may have committed. (Emphasis added, see *People* v. *Karis*, *supra*, 46 Cal.3d 612, 657.)" (Petn., Appendix pp. a49 to a51.)

The petition for writ of certiorari should be denied because the California Court of Appeal's findings of fact and conclusions of law are entirely correct and should be accorded deference by this Court.

When a convicted defendant claims his attorney's assistance was so defective as to require a reversal of his conviction, he has the burden of showing both deficient performance *and* prejudice. Errors must be so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment. Prejudice is shown only if it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

> "Unless a defendant makes both showings it cannot be said

> that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." (*Strickland* v. *Washington*, 466 U.S. 668, 687 (1984), [80 L.Ed.2d 674, 104 S.Ct. 2052].)

A court hearing an ineffective assistance of counsel claim must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and must consider the totality of evidence before the jury. (*Id.*, at pp. 690-691.)

The purpose of the Sixth Amendment right to counsel is "simply to insure criminal defendant's [six] receive a fair trial." (*Id.*, at 689.) Therefore, any deficiency in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. Specifically, a defendant must prove that the errors denied him a fair trial -- a trial whose result is unreliable. (*Strickland* v.

Washington, supra, 566 U.S. at pp. 691-692; *Hines* v. *Enomoto*, 658 F.2d 667, 675 (9th Cir. 1981).)

On federal review of a petition for writ of habeas corpus, the findings and conclusions of the state court are to be accepted unless they are clearly erroneous. (*Wainwright* v. *Goode*, 464 U.S. 78, 85 (1983) 78 L.Ed.2d 187, 104 S.Ct. 378; *Gotcher* v. *Beto*, 444 F.2d 696, 699 (5th Cir. 1971).) Indeed, Congress has mandated that federal courts pay deference to state court factual determinations in habeas corpus actions. (28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 449 U.S. 539, 546-547 (1981) [66 L.Ed.2d 722, 101 S.Ct. 764.)

Clearly, the petitioner bears the burden of proof of establishing he received ineffective assistance of counsel. (*Strickland* v. *Washington*, *supra*, 466 U.S. 668 at 694; *In re Bower*

(1985) 38 Cal.3d 865, 872; *In re Lawler* (1979) 23 Cal.3d 190, 194.) Petitioner is obliged to state with particularity the facts upon which the petition is based; vague, conclusary allegations are insufficient to warrant issuance of a writ. (*Schlette* v. *California* (9th Cir. 1960) 284 F.2d 827; *Austad* v. *Risley*, (1985) 761 F.2d 1348, 1352-1354; *In re Swain* (1949) 34 Cal.2d 300, 303-3904.) When the petition fails to reveal sufficient facts to establish a prima facie case for relief, summary denial is appropriate. (*Schlette* v. *California*, *supra*, 284 F.2d 827, 833-834; *Austad* v. *Rislet*, *supra*, 761 F.2d 1348, 1352-1354; *People* v. *Jackson* (1980) 28 Cal.3d 264, 196; *People* v. *Madaris* (1981) 122 Cal.App.3d 234, 241-242.)

Moreover, as *Strickland* further explained, '[w]hen a convicted defendant complains of the ineffectiveness of

counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.' (*Strickland* v. *Washington* (1984) 466 U.S. 668, 688.)

> "The Sixth Amendment . . . relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." (*Id.*, [citation omitted]; see *People* v. *Pope* (1979) 23 Cal.3d 412, 424-425 ('critical tactical decision which would not be made by diligent, ordinarily prudent lawyers in criminal cases"; "failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates').

Certain "basic duties" have been identified. These include a "duty of loyalty, a duty of avoiding conflicts of interest," (*Strickland* v. *Washington*, *supra*, 466 U.S. at 688, a "duty to investigate carefully all defenses of fact

and law that may be available," *Pope*, 23 Cal.3d at 425, a duty to consult, advise and keep the defendant informed concerning his case, *Strickland*, 466 U.S. at 688, *People* v. *Pope* (1979) 23 Cal.3d 412 at 425, and an "overreaching duty to advocate the defendant's cause" and "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." (*Strickland*, *supra*, at 688. See, generally, *People* v. *McKenzie* (1983) 34 Cal.3d 616, 631.)

"More specific guidelines are not appropriate." (*Strickland*, *supra*, at p. 688.) "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable," but no "detailed set of rules can satisfactorily take account of the variety of circumstances that may affect legitimate decisions regarding how best to represent

a criminal defendant." (*Id.*) Detailed rules may also interfere with the constitutional independence of counsel and restrict the "wide latitude" counsel must have in making tactical decisions. (*Id.*) The purpose of the guarantee of effective assistance of counsel is not to improve the quality of the legal profession, but "simply to ensure that the criminal defendants receive a fair trial." (*Id.*)

Hence, "[j]udicial scrutiny of counsel's performance must be highly deferential." (*Id.*) "'"There may be considerations not shown by the record, which could never be communicated to the reviewing court as a basis for its decision . . ."'" (*People* v. *Whittington* (1977) 74 Cal.App.3d 806, 819, citing *People* v. *Jenkins* (1975) 246 Cal.App.2d 343, 351.)

> "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects

of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (*Strickland*, 466 U.S. 688-689 [citation omitted]; see *People* v. *Frierson* (1979) 25 Cal.3d 142, 158.)

"Further, a defendant, while entitled to a reasonably competent representation, is not guaranteed a successful defense or even a letter-perfect defense. Even the most competent counsel may from time-to-time make decisions or conduct himself in a manner which might be criticized by other equally competent counsel but that is not the measure of competency of counsel on review by an appellate court." (*People* v. *Wallin* (1981) 124 Cal.App.3d 479, 484-485.)

"[T]he court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make

> the adversarial testing process work in the particular case." (*Strickland, supra*, at p. 689.)
>
> "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." (*Id.*, at p. 688.)
>
> "It is not sufficient to allege merely that the attorney's tactics were poor, or that the case might have been handled more effectively . . . Rather, the defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics." (*People* v. *Floyd* (1970) 1 Cal.3d 694, 709.)

Therefore, because the record here entirely supports the California Court of Appeal's determination petitioner received wholly effective representation and, that in any event, he was not prejudiced by any deficiencies in his counsel's performance, the petition for writ of certiorari should be denied.

Nor is petitioner correct in his second argument that the California Court of Appeal erred in failing to follow the dictates of *Javor* v. *United States*, 724 F.2d 831 (9th Cir. 1984), by confusing the "right to counsel" with the "right to effective assistance of counsel". (Petn., pp. 12-13.)

Indeed, the California Court of Appeal directly demonstrated it was fully aware of the import of the decision rendered in *Javor* when it observed that the holding in *Javor* was entirely premised upon the fact that defense counsel had slept through a substantial portion of the trial itself. As the California Court of Appeal correctly pointed out, the conduct of counsel in that case in itself constituted the withholding of legal representation to the defendant warranting the finding that no separate or additional showing of prejudice was required. The

decision below is entirely correct for *Javor* clearly does not hold that prejudice is not required for a reversal. *Javor* is inapposite, for the issue here, as correctly pinpointed by the California Court of Appeal, was not whether counsel was withheld, but whether counsel so supplied was "ineffective". (See Petn., Appendix pp. a13 - a14.)

Moreover, that the California Court of Appeal did not confuse these two fundamental rights of representation is directly shown by its concluding remarks when it stated:

> "While the constitutional right to assistance of counsel includes the guarantee that such assistance be effective, due process does not require counsel to render errorless representation, but rather to render reasonably effective assistance. [Citations.] (See Petn., Appendix pp. a48 to a49.)

Clearly, the California Court of Appeal was clear in its understanding of the petitioner's right to the *effective*

assistance of counsel as distinct from his basic right to *be represented*. Here, however, the Court of Appeal correctly determined petitioner received both of his rights to representation. Accordingly, for these reasons as well, the petition for certiorari should be denied.

II

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE LACHES ATTACHED AS A RESULT OF THE PETITIONER'S UNJUSTIFIED DILATORY DELAY IN RAISING THE INCOMPETENCY CLAIM

While the petitioner in this case was convicted on November 19, 1980, and his convictions and sentence were upheld by the Court of Appeal on February 16, 1982, petitioner did not raise this contention of incompetence of counsel until February 24, 1988, when he filed the petition for writ of habeas corpus. The petitioner thus raised this issue eight years after his conviction, nearly six years after its appellate affirmation, and over 2-1/2 years after the October 1985 death of his trial counsel. Clearly, the petitioner brings his complaint far too late and is barred by laches.

Indeed, it has long been established that habeas corpus cannot serve as a substitute for appeal, and that

matters that could have been, but were not, raised on appeal are not cognizable on habeas corpus in the absence of special circumstances warranting departure from that rule. (*In re Dixon* (1953) 41 Cal.2d 756, 759; *In re Walker* (1974) 10 Cal.3d 764, 773.) Further, habeas corpus cannot serve as a second appeal, and matters which were raised and rejected on appeal are not cognizable on habeas corpus in the absence of special circumstances. (*In re Huffman* (1986) 42 Cal.3d 552, 554-555; *In re Terry* (1971) 4 Cal.3d 911, 927.)

Importantly, where, as here, a substantial delay has occurred between the sustaining of the original conviction and the subsequent collateral attack on the judgment, the petitioner clearly bears the burden of stating a prima facia case entitling him to relief if true and must explain and justify the delay in making his claim. (*In re Lawler* (1979) 23 Cal.3d

190, 194; *In re Swain* (1949) 34 Cal.2d 300, 304.) The petitioner has the burden to fully disclose his reasons for delay in the presentation of the underlying facts to the reviewing court upon which he would have a final judgment overturned. His failure to do so and to satisfactorily explain and justify the delay requires the denial of his petition. (See on point, *Harris* v. *Pulley* (9th Cir. 1988) 852 F.2d 1546, 1557-1558, and cases cited therein; *In re Walker* (1974) 10 Cal.3d 764, 774, citing *In re Wells* (1967) 67 Cal.2d 873, 875, and *In re Shipp* (1965) 62 Cal.2d 547, 553.) Indeed, the California Supreme Court has repeatedly held failure of petitioner to offer a satisfactory explanation for his dilatoriness in waiting several years after the initial conviction before seeking extraordinary relief bars review of later advanced claims of error. (*In re Swain*, *supra*, 34

Cal.3d 300 at 302 (three-year delay); *In re Wells*, *supra*, 67 Cal.2d 873 at 875 (nineteen-year delay); *In re Streeter* (1967) 66 Cal.2d 47, 52 (approximately twenty-three-year delay). (See also *In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1.)

Here, not only was petitioner's complaint of incompetence of counsel rejected by the California Court of Appeal in the original appeal, but petitioner entirely failed to satisfactorily explain and justify his protracted delay in raising this contention in the present habeas corpus action. (See Petn., Appendix pp. a4-a5, a8.)

Clearly, petitioner's unjustified dilatory delay in raising this issue precludes his claim he was denied effective assistance of counsel.

As the federal courts have long held, where a petitioner has knowingly

failed to raise an issue below or has inexcusably delayed bringing an action to the People's prejudice, an abuse of the writ will be found and the petitioner denied relief. (*Price* v. *Johnston* (1947) 334 U.S. 266, 292-294; *Witt* v. *Waynewright* (11th Cir. 1985) 755 F.2d 1396, 1397-1398; *McCowan* v. *Callahan* (1st Cir. 1984) 726 F.2d 1, 10-11; *Aiken* v. *Spalding* (9th Cir. 1982) 684 F.2d 632, 633-634; see also on point, *Thigpen* v. *Smith* (11th Cir. 1986) 792 F.2d 1507, 1512-1514 [death of witness as engendering prejudice to the People].)

Here, it is absolutely clear that petitioner was aware that his trial counsel had been ill and suffered from brain seizures for the matter was even raised and litigated on the original direct state appeal. Notwithstanding petitioner's knowledge, he failed for six and a half years to file habeas corpus and the People have been ultimately prejudiced

by the death of trial defense counsel. As a matter of fact, it is obvious that it is the very death of trial counsel which has prompted the new habeas filings in this case. This is so, because the People are entirely without the ability to rebut, through testimony of trial counsel, that his trial tactics were unknowing or that he failed to consider, develop or advance particular evidence or motions. Therefore, because the People have been prejudiced as a direct result of the unjustified delay of the petitioner, this Court should find that laches has attached and the petition for writ certiorari should therefore be denied.

CONCLUSION

Because the record below wholly supports the determinations by the California Court of Appeal both in its original February 1982 appellate review of the petitioner's convictions and in its March 1989 review upon habeas corpus, that petitioner received wholly effective assistance of counsel, the petition for writ of certiorari should be denied. Moreover, because the California Court of Appeal's determination on writ of habeas corpus that the petitioner was not prejudiced by any acts or omissions by his trial counsel does not conflict with any federal authority, and because Laches has attached as a result of petitioner's unjustified delay in litigating his claim of incompetent representation, the

petition for writ of certiorari should additionally be denied.

Respectfully submitted,

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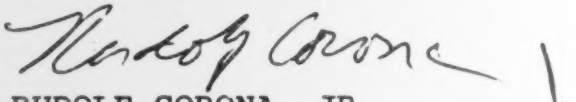

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Attorney:

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Attorney General

No: 88-2100
October Term, 1988

THOMAS JOSEPH DUFON,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101

I have served the within RESPONSE TO PETITION FOR WRIT OF CERTIORARI as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Carl M. Lewis
Lemish & Lewis
555 Camino del Rio South, Suite 201
San Diego, California 92108

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 13th day of September, 1989.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September 13, 1989.

Blanca Lopez
BLANCA LOPEZ

Subscribed and sworn to before me
this 13th day of September, 1989.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1990

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 88-2100

Thomas Joseph Dufon (Petitioner or Appellant) *vs.* State of California (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for State of California,

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Rudolf Corona Jr.

(Type or print) Name Rudolf Corona, Jr., Supervising Deputy Attorney General

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

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ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A

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